

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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76-7476

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David
Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE
DONOGHUE,

Defendants-Appellees-Cross-Appellants,

-and-

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW
M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as
Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D.
STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGEN-
BURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the
Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER,
CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as
Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine,
Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-
Appellants-Cross-Appellees,

Appeal from a Judgment of the United States
District Court for the Southern District of New York

REPLY BRIEF OF APPELLANT-CROSS-APPELLEE CHARLES SLOANE

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SLOANE's Brief on Appeal focused on the issue of liability of an innocent aider or abettor of a tortious conversion. It was argued there that the transferor and transferee were Newburger Loeb & Co. and Newburger Loeb & Co., Inc.; that SLOANE was merely a shareholder in Newburger Loeb & Co., Inc.; and that SLOANE had no knowledge that the Transfer on February 11, 1971 was in violation of § 98 of the N.Y. Partnership Law. Because SLOANE was on neither end of the conversion, and innocent of the tortious nature of the transfer vis a vis Gross, SLOANE argued that he should not be held liable to Gross.

Gross' Brief on Appeal pokes no holes in this thesis but rather supports the SLOANE contention in several areas: The Gross Brief admits that no one knew the transfer to be tortious as to Gross even as the transfer was being planned and carried out. Gross' Brief states at several places that the honorable attorney Mr. Burak was always of the opinion that only the signatures of Bleich and Donoghue were necessary for the transfer. Gross himself has admitted in his Brief on Appeal at P 34 thereof, and again on P 36 that Burak said that the impediment was the signatures of the two women. At no time did Burak, or anyone else alert

SLOANE that the transfer violated some duty to Gross.

SLOANE, owed no kind of fiduciary duty to Gross either. SLOANE had withdrawn from the Partnership well prior to the transfer on February 11, 1971 so that at that point he had no duty to Gross as a partner nor manager (A 3706). His status at Newburger Loeb was exactly the same as that held by Gross himself as a withdrawn General Partner.

On the other side of the transaction, SLOANE was a very minor shareholder of the new corporate entity. But contrary to the mistatement of fact contained on P 9 of Gross' Brief on Appeal, SLOANE was never part of the original plan to reorganize Newburger Loeb. Cross' reference to A 2880 and 2882 demonstrates that Frank, not SLOANE was part of the original reorganization plan. SLOANE came in as an after thought. (A 2777-9, 2875) SLOANE never even came to New York during the entire pre-transfer negotiating period. He remained in California.

If one views the evidence in its entirety one can see that SLOANE's entire involvement in the case and the act for which he is really being held liable are those involving the arbitration called Kayne and Sloane v. Gross.

The Court has held, and we believe erroneously, that the purpose of this law suit was to pressure Gross into signing the transfer agreement or to retain Gross' money in the corporation if he did not sign. Neither of these reasons make good sense for several reasons: (a) this was a personal suit, not a suit on behalf of the corporation, and it would not have affected any claims Gross may have had against the corporation; (b) neither SLOANE nor anyone else who signed believed that Gross had any rights to be paid his money on February 11, 1971, (c) it had already been suggested to Gross' counsel that he enjoin the transfer to get an immediate judicial opinion on the matter but he opted not to. If Gross had done that then, these six years of law suits would have been avoided. Obviously Gross did not want a quick resolution to his claims.

But more importantly, the arbitration is not the legal basis upon which liability was assessed against SLOANE. SLOANE was held liable to Gross for the conversion of Gross' capital contribution only. SLOANE was not held liable for the conversion of the in-kind securities and he was not held liable for the punitive damages. Judge Owen's analysis of the reason for assessing punitive damages relies

heavily on his view of the arbitration as being baseless. However, Judge Owen never referred to the arbitration in arriving at his conclusion that the capital contribution of Gross were tortiously converted by virtue of the Transfer Agreement.

In sum, the court seemed to find that SLOANE participated in a baseless law suit against Gross but it assessed no damages for this on SLOANE. On the other hand, there is absolutely no proof that SLOANE knowingly aided in converting the capital contribution of Gross by entering into the Transfer Agreement but yet was found liable for this "tort" of conversion.

CONCLUSION

Because Judge Owen's holding of liability is not supported by the facts nor by his findings of facts it is respectfully urged that Sloane's name be stricken from the judgment and that the counterclaim be dismissed as to him.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

ROBERT LA GRASSA, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 62-20 60th Rd.
MASPETH, NYC.

That on the 5th day of APRIL, 1977,
deponent personally served the within REPLY BRIEF OF ADDITIONAL
DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE CHARLES SLOANE
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

~~By leaving true copies of same with a duly
authorized person at their designated office.~~

By depositing 2 true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

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(SEE FOLLOWING PAGE FOR ADDITIONAL NAMES)

Robert La Grassa

Sworn to before me this

5th day of APRIL, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-093008
Qualified in Queens County
Commission Expires March 30, 1979